No. 82 5834

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WALTER JUNIOR BLAIR,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

On Petition for a Writ of Certiorari to the Missouri Supreme Court, en Banc.

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether it was a violation of the cruel and unusual punishment provision of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to fail to submit to the jury in a prosecution for capital murder, which is intentional murder, an instruction upon first degree murder, which is felony murder, when there was sufficient evidence to support a conviction of first degree murder and when capital murder's requisite intent to kill may not be supplied by the felony-murder doctrine and even though the jury was instructed upon intentional second degree murder?

2. Whether the Missouri Supreme Court's decision in petitioner's case and in State v. Baker, 636 S.W.2d 902 (Mo. banc 1982), relied upon in petitioner's case, that there is no such cruel and unusual punishment and due process violation conflicts with this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980)?

3. Whether the Missouri Supreme Court's decision in petitioner's case and in State v. Baker, 636 S.W.2d 902 (Mo. banc 1982), relied upon in petitioner's case, that first degree murder is not a lesser-included offense of capital murder is an unforseen judicial construction of §556.046.1(2), RSMo 1978, defining lesser included offenses as those "specifically denominated by statute as a lesser degree of the offense charged," that operates, when applied retroactively, as the equivalent of an ex post facto law, prohibited by the Due Process Clause of the Fourteenth Amendment and §10 of Article I of the Constitution?

4. Whether the Missouri Supreme Court's affirmance of petitioner's sentence of death and conviction of capital murder, committed on August 19, 1979, even though an instruction upon first degree murder which was supported by the evidence was not submitted to the jury, violates the Equal Protection Clause of the Fourteenth Amendment, when that Court reversed in State v. Fuhr, 626 S.W.2d 379 (Mo. 1982) a sentence of life imprisonment without probation or parole for fifty years and conviction of capital murder, committed on February 6, 1980, for failure to submit such a first degree murder instruction?

5. Whether permitting the jury, in determining whether an existing aggravating circumstance is sufficient to warrant the imposition of death, to consider all of the evidence relating to the murder of Kathy Jo Allen, insofar as it included that petitioner had been arrested for an unrelated murder and confined in the penitentiary, resulted in the arbitrary and capricious imposition of the death penalty, in violation of the cruel and unusual punishment provision of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, when the record of prior arrests and confinements has not been authorized as an aggravating circumstance or as a reason for finding that an existing aggravating circumstance is sufficient to warrant the imposition of death?

6. Whether the Missouri Supreme Court so broadly and vaguely construed the aggravating circumstance that the killing was committed for the purpose of interfering with a lawful custody in a place of lawful confinement as to result in, under the evidence of the killing in petitioner's case and as lawful custody has been construed to mean present custody, the arbitrary and capricious imposition of the death penalty, in violation of the cruel and unusual provision of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment of the Constitution?

7. Whether the sentence of death must be reversed because of the broad and vague construction of the aggravating circumstance that the killing was committed for the purpose of interfering with a lawful custody in a lawful place of confinement, even though the jury found three, other aggravating circumstances to exist?

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PETITION FOR CERTIORARI

Walter Junior Blair, petitioner herein, respectfully requests that a writ of certiorari issue to review the judgment of the Missouri Supreme Court, en Banc, in the case styled "State of Missouri vs. Walter Junior Blair, No. 62782."

OPINION

The opinion of the Missouri Supreme Court, en Banc, in the case styled "State of Missouri vs. Walter Junior Blair, No. 62782," the case for which the writ of certiorari is being sought, was filed on August 31, 1982 and may be found in the Appendix at page 1. (References to the Appendix will hereafter be cited as A.____.) It recently has been published at State v. Blair, 638 S.W.2d 739 (Mo. banc 1982).

JURISDICTIONAL STATEMENT

In "State of Missouri vs. Walter Junior Blair, No. 62782," the opinion of the Missouri Supreme Court, en Banc, was filed on August 31, 1982. The opinion affirmed Blair's sentence of death, §565.008.1, RSMo 1978, and conviction of capital murder, §565.001, RSMo 1978. The opinion may be found at A.1. Blair's timely Motion for Rehearing, which may be found at A.29, was overruled by the Missouri Supreme Court, en Banc, on October 7, 1982. The order overruling the motion may be found at A.42. Blair's Motion for Stay of Execution and his Supplemental Motion for Stay of Execution, which may be found at A.38 and A.40, directed to the Missouri Supreme Court, en Banc, was overruled by that Court on October 7, 1982.

The order overruling the motions may be found at A.42. Blair's Application for Stay of Execution of a Sentence of Death (appendices omitted), which may be found at A.43, directed to the Honorable Harry A. Blackmun, Associate Justice of the Supreme Court of the United States and Circuit Justice of the Court of Appeals, Eighth Circuit, was sustained by the Justice on October 14, 1982. The order sustaining the motion may be found at A.49.

This petition has been filed within sixty days after the rendering of the final judgment in this case, and this Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, §10, Eighth Amendment, and Fourteenth Amendment, are set forth at A.50.

STATUTES INVOLVED

Sections 559.010, 559.020, and 556.220, RSMo 1969, are set forth at A.51. Section 559.005 and 559.007, RSMo Supp. 1975, are set forth at A.51. Sections 556.046.1(2), 565.001, 565.003, 565.004, and 565.008.1, RSMo 1978, are set forth at A.51-52. Sections 491.050, 557.036.1, 565.006.2, 565.012.1, 565.012.2, and 565.012.3, RSMo Supp. 1982 are set forth at A.52-58.

STATEMENT OF THE CASE

Walter Junior Blair, petitioner herein, was charged by indictment with the capital murder of Kathy Jo Allen, §565.001, RSMo 1978, punishable by death or life imprisonment without probation or parole for fifty years, §565.008.1, RSMo 1978.

At the determination of guilt proceeding, evidence was adduced by the State supporting two theories of guilt -- one that petitioner intentionally killed Kathy Jo Allen for money so that she could not testify in a rape trial and another that petitioner killed her when she grabbed his gun as he was attempting to hold her incommunicado throughout the course of the rape trial. Larry Jackson was arrested and charged with the rape of Kathy Jo Allen and was confined in the custody of the Jackson County Jail on that charge and on charges of the first degree murder, second degree robbery and armed criminal action of Jerry Willard Han prior to trial. While in jail, Jackson offered petitioner, who was in jail on an unrelated charge, $2,000 to

kill Allen to keep her from testifying. After petitioner was released on bond from the jail, he kept in contact with Jackson, who raised his offer to $6,000, and also contacted Jackson's family.

During the early morning hours of Sunday, August 19, 1979, petitioner removed the screen to the bedroom window of Allen's apartment and went inside. Petitioner found Allen and her boyfriend, Robert Kienzle, asleep on a mattress in the living room. He took money from Kienzle's wallet and his watch and diamond ring. When Kienzle and Allen awoke, petitioner announced that he was just there to rob them and that he was not there to hurt or kill anyone. When petitioner left the apartment, he announced that he was taking Allen with him to act as his driver and that she would be back in seven to ten minutes.

Kathy Jo Allen's body, shot from close range in the head, chest and wrist, nude from the waste up, and bearing abrasions and lacerations consistent with being struck on the head by a brick, was found at 6:30 A.M. in a vacant lot.

Petitioner was arrested and confessed orally, in writing and on a video tape. Petitioner admitted that he killed Kathy Jo Allen and that he was hired by Larry Jackson, but claimed that he only intended to hold Allen in an abandoned house throughout the course of Jackson's rape trial and that he shot her only when she grabbed his gun. Petitioner also admitted that he previously had been arrested for an unrelated murder and confined in the penitentiary. Petitioner objected to the admission into evidence of this portion of his confession. The objection may be found in the Transcript on Appeal at page 1808. (References to the Transcript on Appeal will hereafter be cited as Tr. __). Other evidence of guilt -- including petitioner's receipt of $1,000 from Jackson's mother upon his showing of Allen's driver's license to Jackson's family -- was also adduced.

Petitioner testified. His theory of defense was that he was at home when the murder occurred, that one of the State's witnesses committed the murder, and that his confessions were false and had been coerced by threats and promises by police officers.

The issue of guilt was submitted to the jury upon instructions for capital murder, intentional second degree murder and

manslaughter. Under the Missouri law in effect at the time of petitioner's trial, petitioner was not required to request an instruction upon any lesser-included offense or to object to any matter concerning the instructions. The jury returned a verdict of guilty of capital murder.

At the determination of punishment proceeding, the only evidence introduced was the State's proof of petitioner's prior convictions of assault with intent to rob with malice aforethought and attempted second degree burglary. The issue of punishment was submitted to the jury upon an instruction submitting four statutory aggravating circumstances, including that the murder of Kathy Jo Allen was committed for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson, and the aggravating circumstance otherwise authorized by law of petitioner's record of prior criminal convictions. The issue of punishment was also submitted to the jury upon another instruction permitting the jury to consider, in deciding whether an existing aggravating circumstance was sufficient to warrant the imposition of death, all of the evidence relating to the murder of Kathy Jo Allen. The jury returned a verdict, fixing the punishment at death and finding the four statutory aggravating circumstances, but not the aggravating circumstance otherwise authorized by law, to exist.

Petitioner's timely motion for new trial alleged that the trial court erred in failing to submit to the jury an instruction upon first degree murder, which may be found in the Legal File at page 49 (references to the Legal File will hereafter be cited as L.F. __); in admitting into evidence that portion of petitioner's confession admitting that he previously had been arrested for an unrelated murder and confined in the penitentiary (L.F. 53); and in submitting to the jury the aggravating circumstance that the murder of Kathy Jo Allen was committed for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson (L.F. 53).

The Missouri Supreme Court affirmed petitioner's sentence of death and conviction of capital murder. The court held that: 1) first degree murder need not have been submitted to the jury, because it was not a lesser-included offense of capital murder and

that the risk of an arbitrary and capricious conviction of capital murder was negated by the submission of intentional second degree murder; 2) evidence of petitioner's arrest on an unrelated murder and confinement in the penitentiary was properly admitted as a part of petitioner's confession and to show petitioner's motive for the killing, but made no comment about the propriety of the jury's consideration of that evidence in the punishment stage of the trial; and 3) there was sufficient evidence to support the jury's finding of the aggravating circumstance that the killing was committed for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson.

Petitioner alleged in his motion for rehearing that the Missouri Supreme Court denied him due process and equal protection of the law and applied an ex post facto law by deciding that first degree murder is not a lesser-included offense of capital murder and affirming his sentence of death and conviction of capital murder, committed in August 19, 1979, even though an instruction upon first degree murder was not submitted to the jury, when that Court reversed a sentence of life imprisonment without probation or parole for fifty years and conviction of capital murder, committed on February 6, 1980, for failure to submit such a first degree murder instruction (A.29).

REASONS FOR GRANTING THE WRIT

Questions Presented 1 and 2

This Court has prohibited, as a violation of the cruel and unusual punishment provision of the Eighth Amendment and of the Due Process Clause of the Fourteenth Amendment, determination of guilt procedures that result in the arbitrary and capricious finding of guilt of an offense for which the death penalty may be imposed. Beck v. Alabama, 447 U.S. 625 (1980). In the Beck case the trial judge was prohibited by Alabama law from instructing the jury upon the noncapital offense of felony murder, a conviction of which would have been supported by the evidence, when the capital offense of robbery-intentional killing was charged. Because under Alabama law the intent to kill necessary for conviction of robbery-intentional killing could not be supplied by the felony-murder doctrine, felony

murder was a lesser-included offense of robbery-intentional killing. Because the jury only was given the option of either convicting the defendant of a capital offense or acquitting him and not the "third option" of convicting him of a lesser-included, noncapital offense, the risk of an arbitrary and capricious conviction of a capital offense, and thus an arbitrary and capricious imposition of the death penalty, was enhanced. Beck v. Alabama, supra, 447 U.S. at 627-630, 637-638. Cf. Hooper v. Evans, ___ U.S.___, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982), when the evidence would not support a conviction for a noncapital, included offense.

Though the Missouri Supreme Court has characterized first degree murder, §565.003, RSMo 1978, which may be found at A.51-52, as not a lesser-included offense of capital murder, §565.001, RSMo 1978, which may be found at A.51, in the sense of either having necessarily included elements of capital murder or being specifically denominated as a lesser degree of capital murder, State v. Baker, 636 S.W.2d 902, 904 (Mo. banc 1982), first degree murder is a lesser-included offense of capital murder in the third sense that capital murder's requisite intent to kill may not be supplied by the felony-murder doctrine. Missouri has split first degree murder, which included both intentional and felony murder, Section 559.010 RSMo 1969, which may be found at A.51 and no longer exists, into capital murder, §565.001 RSMo 1978, which is intentional murder, and into first degree murder, §565.003 RSMo 1978, which is felony murder. State v. Duren, 547 S.W.2d 476, 478 (Mo. banc 1977); State v. Handley, 585 S.W.2d 458, 461-462 (Mo. banc 1979); State ex rel. Westfall v. Mason, 594 S.W.2d 908, 919-920 and 920 n. 1 (Mo. banc 1980) Bardgett, C.J., dissenting; State v. Haymon, 616 S.W.2d 805, 807 (Mo. banc 1981); State v. Lane, 629 S.W.2d 343, 347 (Mo. banc 1982)[1]

> The phrase [in §565.003, RSMo 1978] "without a premeditated intent to cause the death of a particular individual" was intended to exclude the homicides now classified as capital murder and committed deliberately, knowingly, etc. It was not intended to exclude intentional, non-deliberate homicides committed in the perpetration of or attempt to perpetrate the enumerated felonies.

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[1]The repeal of §559.010, RSMo 1969, came about as one of the results of this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). Duren, supra.

Missouri Approved Instructions -- Criminal, V.I, 15.04 Murder in the First Degree in Arson, Note on Use 3 (2d ed., The Missouri Bar, 1979) (hereinafter MAI-CR2d). Previously under §559.010, RSMo 1969, the requirements of proof for intentional murder could be satisfied by proof of murder committed during the course of a felony. State v. Grandberry, 484 S.W.2d 295, 300 (Mo. banc 1972).

The Missouri Supreme Court has examined in Baker, supra, the constitutionality of Missouri's capital murder instructional scheme in light of Beck v. Alabama, supra. The Court failed to realize that first degree murder is included in capital murder in the sense that the intent to kill necessary for capital murder may not be supplied by the felony-murder doctrine. The Court held that the risk of an arbitrary and capricious conviction of capital murder does not exist, because the jury was submitted an instruction upon intentional second degree murder. Baker, supra, 636 S.W.2d at 905. The different mental states required for capital murder and intentional second degree murder, the court reasoned, provide the jury with a "third option," conviction of intentional second degree murder, between conviction of capital murder and acquittal. Baker, supra, 636 S.W.2d at 905.

This "third option" of conviction of a degree of intentional murder different from capital murder is no option at all in the event that the jury were to believe from the evidence that a homicide was committed, but that it was committed without the mental states necessary for either capital murder or intentional second degree murder. In that event, the homicide of which the accused is guilty is first degree murder for which, because of the absence of an instruction submitting it, the jury cannot return a finding of guilt. Also in that event, the jury's decision on guilt of either capital murder or intentional second degree murder, because it is not based upon a determination of the mental states necessary for either offense, must necessarily be arbitrary and capricious.

In petitioner's case, the jury could have disbelieved both the State's evidence that petitioner intentionally killed Kathy Jo Allen and petitioner's testimony that he was at home when the killing occurred,

yet still believed that portion of the State's evidence in petitioner's confessions that he killed Kathy Jo Allen, but that he only intended to hold her incommunicado throughout the rape trial and that he shot her only when she grabbed his gun. The State's evidence supported two theories of guilt, intentional murder and felony murder, but the trial court submitted only one theory -- intentional murder. In the event that the jury were to believe that portion of the State's evidence in petitioner's confessions, the homicide of which petitioner is guilty is first degree murder for which, because of the absence of an instruction submitting it, the jury cannot return a finding of guilt, and the jury's decision on guilt of capital murder, because it is not based upon a determination of the mental states necessary for that offense, must necessarily be arbitrary and capricious.

Questions Presented 3 and 4

Due process prohibits the unforseen judicial construction of a state statute that operates, when applied retroactively, as the equivalent of an ex post facto law, prohibited by §10 of Article I of the Constitution. Bouie v. Columbia, 378 U.S. 347 (1964). Even procedural changes that "deprive the accused of any substantial right or immunity possessed by them at the time of the commission of the offense charged," Mallett v. North Carolina, 181 U.S. 589, 597 (1901), or "operate to deny the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition," Beazell v. Ohio, 269 U.S. 167, 170 (1925), are prohibited by the ex post facto clause.

In State v. Handley, 585 S.W.2d 458, 461-462 (Mo. banc 1979) a plurality of the Missouri Supreme Court stated that §559.010, RSMo 1969, which no longer exists, included both intentional and felony first degree murder. From September 28, 1975, §565.001, RSMo 1978, then §559.005, RSMo Supp. 1975, includes only intentional first degree murder and is designated "capital murder." Also from that date, §565.003, RSMo 1978, then §559.007, RSMo Supp. 1975, includes only felony first degree murder. The court stated that "a distinct new crime of 'first degree murder' was created," the elements of which are the unlawful killing of a human being without a

premeditated intent committed in the perpetration of or attempt to perpetrate one of five enumerated felonies.

The court further stated that intentional second degree murder, §565.004, RSMo 1978, which may be found at A.52 and then §559.020, RSMo 1969, is not a lesser-included offense of first degree murder, because first degree murder does not include the elements of intentional second degree murder. Thus since the indictment charged only first degree murder, the submission to the jury of an instruction upon second degree murder was error, and the court reversed the defendant's conviction for second degree murder.

The Handley case did not decide the issue of whether intentional second degree murder is a lesser-included offense of first degree murder, and certainly not the issue of whether first degree murder is a lesser-included offense of capital murder, because only three judges of the Missouri Supreme Court concurred in the result, the reversal of the intentional second degree murder conviction, not the reasoning by which that result was reached. State v. Bradshaw, 593 S.W.2d 562, 565 (Mo. App. 1979). The Missouri Supreme Court's denial of transfer in Bradshaw, supra, which adopted the reasoning of Handley, supra, also did not decide the issue of whether first degree murder is a lesser-included offense of capital murder. See: Maryland v. Baltimore Radio Show, 388 U.S. 912, 919 (1950). In fact, at the time of the killing in petitioner's case, August 19, 1979, and at the time of his trial, September 30 through October 17, 1980, the Missouri Supreme Court required an instruction upon first degree murder, if supported by the evidence, to be submitted to the jury when capital murder was the highest degree of homicide submitted. MAI-CR2d Supplemental Note on Use 15.00 3d and Caveat c. Thus it was the law at the time of the killing in petitioner's case and at the time of his trial that an instruction upon first degree murder was required to be submitted to the jury. It was not the law at those times that an instruction upon first degree murder was not required to be submitted.

In State v. Wilkerson, 616 S.W.2d 829, 831-832 (Mo. banc 1981) a majority of the Missouri Supreme Court ruled that under §556.220, RSMo 1969, which may be found at A.51 and which had been the law

in Missouri since 1835, intentional second degree murder is a lesser-included offense of first degree murder and thus affirmed a conviction for intentional second degree murder upon an indictment charging only first degree murder. The court reasoned that since §556.220, RSMo 1969, permits the jury to find the accused guilty "of any degree of such offense inferior to that charged in the indictment" intentional second degree murder is a lesser-included offense first degree murder, even though the elements of those offenses differ. The Wilkerson case criticized the Handley case not for recognizing that capital murder and first degree murder are distinct crimes, but for failing to recognize the effect of §556.220, RSMo 1969, and declaring intentional second degree murder not to be a lesser-included offense of first degree murder.

In State v. Gardner, 618 S.W.2d 40 (Mo. 1981) the Missouri Supreme Court, citing the Wilkerson case, reversed a sentence of life imprisonment without probation or parole for fifty years and conviction of capital murder, which occurred on August 31, 1978 (see State v. Mercer, 618 S.W.2d 1, 3 (Mo. banc 1981) for the date), for failure to submit to the jury an instruction upon first degree murder. In State v. Fuhr, 626 S.W.2d 379 (Mo. 1982) the Court, citing the Wilkerson and Gardner cases, reversed a sentence of life imprisonment without probation or parole for fifty years and conviction of capital murder, committed on February 6, 1980, for failure to submit first degree murder.

In State v. Baker, 636 S.W.2d 902, 904-905 (Mo. banc 1982) the Missouri Supreme Court ruled that under §556.046.1(2), RSMo 1978, which may be found at A.51 and which replaced §556.220, RSMo 1969, on January 1, 1979, first degree murder is not a lesser-included offense of capital murder and affirmed a sentence of death and conviction of capital murder, committed on June 19, 1980, even though an instruction upon first degree murder was not submitted to the jury. The court reasoned that since under §556.046.1(2), RSMo 1978, an offense is included in the information when "[i]t is specifically denominated by statute as a lesser degree of the offense charged" first degree murder is not a lesser-included offense of capital murder.

The Missouri Supreme Court in petitioner's case relied upon Baker, supra, in concluding that an instruction upon first degree murder need not have been submitted.

First degree murder in Gardner, supra, 618 S.W.2d at 40, is a lesser-included offense of capital murder because of the language of the statute defining lesser-included offenses ("any degree of such offense inferior to that charged in the indictment") in effect at the time the killing in that case was committed -- prior to January 1, 1979. First degree murder in petitioner's case and in Baker, supra, 636 S.W.2d at 904-905, is not a lesser-included offense of capital murder because of the language of the statute defining lesser-included offenses ("[i]t is specifically denominated by statute as a lesser degree of the offense charged") in effect at the time the killings in those cases were committed -- subsequent to January 1, 1979. Yet first degree murder in Fuhr, supra, 626 S.W.2d at 379, is a lesser-included offense of a capital murder that was committed subsequent to January 1, 1979, and a conviction of capital murder and sentence of death was reversed for failure to submit an instruction upon first degree murder. And yet a conviction of first degree murder, committed subsequent to January 1, 1979, was affirmed upon a charge of capital murder. State v. Daugherty, 631 S.W.2d 637, 638-639 (Mo. 1982). And yet a conviction of first degree murder, committed subsequent to January 1, 1979, was reversed for failure to submit instructions upon intentional and felony second degree murder. State v. Donovan, 631 S.W.2d 39, 40, 41 (Mo. 1982).

There are six reasons the Missouri Supreme Court's decision in petitioner's case and in Baker, supra, relied upon in petitioner's case, that first degree murder is not a lesser-included offense of capital murder is an unforseen construction of §556.046.1(2), RSMo 1978, defining lesser-included offenses as those offenses "specifically denominated by statute as a lesser degree of the offense charged," that operates, when applied retroactively, as the equivalent of an ex post facto law. First, intentional second degree murder was a lesser-included offense of first degree murder under a statute, in existence from 1835 until January 1, 1979, defining lesser-included

offenses as "any degree of such offense inferior to that charged in the indictment." Secondly, the Missouri Supreme Court required in its notes on use to its approved instructions, at the time of the killing in petitioner's case and at the time of his trial, the submission of first degree murder, if supported by the evidence, when capital murder was the highest degree of homicide submitted. Thirdly, a sentence of life imprisonment without probation or parole for fifty years and conviction for capital murder, committed subsequent to January 1, 1979, was reversed for failing to submit an instruction upon first degree murder. Fourthly, a sentence of life imprisonment and a conviction of first degree murder, committed subsequent to January 1, 1979, was affirmed upon a charge of capital murder. Fifthly, a conviction of first degree murder, committed subsequent to January 1, 1979, was reversed for failure to submit instructions upon intentional and felony second degree murder. Sixthly, the change in the language defining lesser-included offenses from "any degree of such offense inferior to that charged in the indictment" to "specifically denominated by statute as a lesser degree of the offense charged" in so slight as to be without significance.

The Missouri Supreme Court's affirmance of petitioner's sentence of death and conviction of capital murder, committed on August 19, 1980, even though an instruction upon first degree murder which was supported by the evidence was not submitted to the jury, violates equal protection, when that Court reversed in Fuhr, supra, 636 S.W.2d at 379, a sentence of life imprisonment without probation or parole for fifty years and conviction of capital murder, committed on February 6, 1980, for failure to submit a first degree murder instruction. The Court has treated similarly situated defendants -- petitioner and Fuhr, who both committed murders subsequent to January 1, 1979 and in whose trials an instruction upon first degree murder was not submitted to the jury -- differently, yet failed to advance any rational basis to justify this disparate treatment. See: Jones v. Helms, 452 U.S. 412 (1981); Carey v. Brown, 447 U.S. 455 (1980).

Question Presented 5

The jury's discretion to fix death as punishment must be directed so that the imposition of death is not done arbitrarially and capriciously, in violation of the cruel and unusual punishment provision of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Furman v. Georgia, 408 U.S. 238 (1972). This direction of the jury's discretion is accomplished in Missouri by holding, after a finding of guilt has been returned, a "pre-sentence hearing," at which the jury "shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas." §565.006.2, RSMo Supp. 1982. Evidence in aggravation is that evidence, introduced either at the determination of guilt proceeding or the determination of punishment proceeding, relevant to those aggravating circumstances specified by statute. §§565.012.1(1) and §565.012.2, RSMo Supp. 1982. Evidence in aggravation is also "[a]ny ... aggravating circumstances otherwise authorized by law." §565.012.1(3), RSMo Supp. 1982. The only other aggravating circumstance otherwise authorized by law is "the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant." §565.006.2, RSMo Supp. 1982. Evidence in mitigation is that evidence, introduced at either the determination of guilt proceeding or the determination of punishment proceeding, relevant to those mitigating circumstances specified by statute. §§565.012.1(2) and §565.012.3, RSMo Supp. 1982. Evidence in mitigation is also "[a]ny mitigating ... circumstances otherwise authorized by law." §565.012.1(3), RSMo Supp. 1982. The only other mitigating circumstance otherwise authorized by law is "the absence of any such prior criminal convictions and pleas." §565.006.2, RSMo Supp. 1982.

Both the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere and the record of any prior arrests and confinements are not relevant to the determination of guilt. The former is only relevant to the issue of credibility, §491.050, RSMo Supp. 1982, and thus is admissible for that purpose at the determination of guilt proceeding. The latter is relevant to show

motive, among other things, as the Missouri Supreme Court reasoned in the opinion affirming petitioner's sentence and conviction, and thus is also admissible for that purpose at the determination of guilt proceeding. Both the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere and the record of any prior arrests and confinements are relevant in the usual case to the determination of punishment. Section 557.036.1, RSMo Supp. 1982. But in the death case, so that the jury's sentencing discretion is directed to avoid the arbitrary and capricious imposition of death, what is usually relevant to the determination of punishment has been limited to that evidence relevant to the statutory aggravating or mitigating circumstances, §§565.012.1(1) and (2), 565.012.2 and .3, RSMo Supp. 1982, and the aggravating or mitigating circumstances otherwise authorized by law, §565.012.1(3), RSMo 1978, which are "the record of any prior criminal convictions in which pleas of guilty or pleas of nolo contendere or of the defendant, or the absence of any such prior criminal convictions and pleas." §565.006.2, RSMo Supp. 1982, not the record of prior arrests and confinements.

The finding by the jury of the existence of a statutory aggravating circumstance or an aggravating circumstance otherwise authorized by law does not compel the jury to fix punishment at death. After it finds an aggravating circumstance exists and before it may fix punishment at death, the jury must decide whether an existing aggravating circumstance is sufficient to warrant the imposition of death. Section 565.012.1(4), RSMo Supp. 1982; MAI-CR2d 15.42; State v. Bolder, 635 S.W.2d 673, 683 (Mo. banc 1982). In making its decision whether an existing aggravating circumstance is sufficient to warrant the imposition of death, the jury may consider "all of the evidence relating to the murder," in other words, all of the evidence introduced at the determination of guilt proceeding. MAI-CR2d 15.42.

The Missouri General Assembly has not authorized the record of prior arrests and convictions to be an aggravating circumstance or a reason for finding that an exiting aggravating circumstance is sufficient to warrant the imposition of death. Thus evidence of the record of prior arrests and convictions is not relevant to the jury's

sentencing decision in the death case. The reason the General Assembly has not made that authorization and why the imposition of death, if based upon the record of prior arrests and confinements, is arbitrary and capricious is obvious -- what one jury may consider to be a record of prior arrests and confinements sufficient to warrant the death penalty another jury may not. See: Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976); State v. White, 395 A.2d 1082 (Del. 1978).

In petitioner's case, four statutory aggravating circumstances and the aggravating circumstance otherwised authorized by law, petitioner's record of prior criminal convictions for attempted burglary, second degree, and assault with intent to rob with malice, were submitted to the jury, and it only found the four statutory aggravating circumstances to exist. In determining whether an existing aggravating circumstance was sufficient to warrant the imposition of death, the jury was permitted to consider all of the evidence relating to the murder of Kathy Jo Allen, which included that portion of petitioner's confession, introduced into evidence over his objection, admitting that he had been arrested for an unrelated murder and confined in the penitentiary. If one of the reasons the jury found the existing aggravating circumstances warranted the imposition of death was that petitioner had been arrested for an unrelated murder and confined in the penitentiary, then death has been imposed arbitrarially and capriciously upon petitioner.

Questions Presented 6 and 7

This court has prohibited, as a violation of the cruel and unsual punishment provision of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment of the Constitution, such a broad and vague construction of a statutory aggravating circumstance as to result in, under the evidence of a particular killing and as the aggravating circumstance previously had been construed, the arbitrary and capricious imposition of the death penalty. Godfrey v. Georgia, 446 U.S. 420 (1980). In the Godfrey case this Court found that the evidence of the killing was insufficient to support a finding of the aggravating circumstance that the killing was outrageously or wantonly vile, horrible of inhuman in that it involved torture,

depravity of mind, or an aggravated battery to the victim, as that aggravating circumstance previously had been construed by Georgia decisions. Godfrey v. Georgia, supra, 446 U.S. at 429-433.

The Missouri Supreme Court has construed "lawful custody" in §565.012.2(9), RSMo Supp. 1982, to mean custody under color of law or custody of a lawful authority. State v. Trimbel, 638 S.W.2d 726, 733 (Mo. banc 1982). Thus lawful custody is present custody, not a future possibility of custody. State v. Blair, 638 S.W.2d 739, 761 (Mo. banc 1982) Seiler, J., dissenting.

In petitioner's case, the statutory aggravating circumstance that the murder of Kathy Jo Allen was committed for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson, §565.012.2(10), RSMo Supp. 1982, was submitted to the jury, which found it and three, other statutory aggravating circumstances to exist. But there was no evidence from which the jury could find that the present custody of Larry Jackson was interfered with as a result of the killing of Kathy Jo Allen. Larry Jackson was in custody not only for the rape of Allen, but also for the first degree murder, second degree robbery and armed criminal action of Jerry Willard Han, charges for which Jackson was eventually convicted. State v. Jackson, 608 S.W.2d 420 (Mo. 1980). The only way the killing of Allen could have interfered with the lawful custody of Jackson was to affect the outcome of Jackson's future trial, and thus the future possibility of custody. Even assuming that lawful custody encompasses future possibility of custody, there was no evidence from which the jury could find that the outcome of the rape trial was affected by Allen's death. Jackson could have been convicted of rape even though Allen was dead, because there may have been a witness, or Jackson may have confessed, or circumstantial evidence may have been sufficient.

In Zant v. Stephens, ___ U.S.___, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), this Court certified to the Georgia Supreme Court the question of what premises of state law support the conclusion that a sentence of death should not be reversed for the invalidity of one of the aggravating circumstances the jury found to exist, when other, valid aggravating circumstances the jury also found to exist. The

Georgia jury had fixed a sentence of death after finding three aggravating circumstances, one of which was declared unconstitutional by the Georgia Supreme Court, which, nevertheless, affirmed the sentence. Stephens v. State, 237 Ga. 259, 227 S.E.2d 261 (1976). The Court of Appeals, Fifth Circuit, reversed the sentence, however, because it was "impossible" for it to determine whether the sentence of death was not "decisively affected" by the unconstitutional aggravating circumstance. Stephens v. Zant, 631 F.2d 397, 406 (CA5 1980); State v. Mercer, 618 W.S.2d 1, 17-20 (Mo. banc 1981) Seiler, J., dissenting. The Court of Appeals' reasoning -- that even if the jury found other aggravating circumstances to exist, it was possible that it would not have recommended death but for finding that the unconstitutional aggravating circumstance existed -- precisely applies to petitioner's case, in which the jury found four aggravating circumstances, one of which, that the killing was committed for the purpose of interfering with a lawful custody in a lawful place of confinement, cannot constitutionally stand for the reason that it was not supported by the evidence.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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